LIM KIT SIANG

v.

UNITED ENGINEERS (M) BHD. & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 21-55-87]
18 AUGUST 1987

CIVIL PROCEDURE: *Prohibitory injunction - To restrain 1st defendant from signing proposed contract pursuant to Letter of Intent - Privatisation of North-South Highway - Whether injunction sought against officer of Government - Section 29 Government Proceedings Ordinance 1956 - Question of irregularities in awarding 'Letter of Intent' (tender) to 1st defendant - Section 2 Emergency (Essential Powers) Ordinance 22/70 - Whether damages adequate in lieu of injunction - Principles applicable.*

This was an application by the plaintiff for an interlocutory prohibitory injunction against United Engineers (M) Bhd., the 1st defendant, by itself or through its agents and/or servants from signing the proposed contract pursuant to the 'letter of intent' for the privatisation of the north south interurban toll expressway. The plaintiff alleged that were the signing of the contract to proceed the government would be embarking upon an illegal transaction his interest as a citizen, motorist and taxpayer and the interest of the public generally would suffer. The plaintiff is a member of Parliament and leader of the opposition.

The application was filed consequent to a civil suit brought by the plaintiff against the defendants, seeking the following reliefs:

(i) A declaration that the award of letter of intent for the privatisation of the North-South highway by the 2nd and 3rd defendants is null and void and of no consequence;

(ii) An injunction to restrain the 1st defendant by itself or through its agents and/or servants or howsoever from signing the contract with any agent and/or servant of the Government of Malaysia;

(iii) Costs and

(iv) Any further or other relief deemed fit and proper by this honourable Court.

Held:

[1] The Court was satisfied that although the injunction sought was in form against the 1st defendant, it would, if granted operate in substance and effect as an injunction against the government of Malaysia, the 4th defendant.

[2] The maxim of equity is that equity Looks to the substance and the intent rather than to the form, and so it was to the substance of the injunction that the Court should look. That being the case, s. 29 of the Government Proceedings Ordinance 1956 posed an insuperable obstacle in the way of the plaintiff.

[3] In assessing where the balance of convenience lies the public interest may rightly be taken into consideration. Bearing this in mind the Court considered that were it to grant the injunction sought its effect would be to impugn the powers, of the Government of Malaysia to enter into contracts. Therefore it would be plainly against the public interest to grant the injunction.

[4] In the absence of any evidence as to the expenditure incurred in the preparations for the signing of the proposed contract the Court did not think it right or fair to place any reliance on the plaintiff's undertaking as to damages offered in lieu of injunction and disregarded it.

[5] In all the circumstances the application was dismissed. There was no order as to costs as the application was made *ex parte*.

[Application dismissed. No order as to costs.]

Cases referred to:
Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd. [1972] 1 WLR 1213
American Cyanamid v. Ethicon [1975] 1 All ER 396
Smith v. Ilea [1978] 1 All ER 411
Morning Star Co-operative Ltd. v. Express Newspapers Ltd. [1979] FSR 113

Legislation referred to:
Government Proceedings Ordinance 1956, s. 29
Contracts Act 1950, s. 24

For the plaintiff - Karpal Singh (N. Shanmugam with him); M/s. Karpal Singh & Co.
For the 2nd, 3rd & 4th defendants - Saari Jusoh, State Legal Adviser, Penang

[Editor's Note: On appeal, the Supreme Court reversed this decision; the plaintiff was granted the injunction he sought, while the defendants were given liberty to apply. The judgment of the Supreme Court is reported in this issue of the CLJ at p. 195.]

JUDGMENT

Edgar Joseph Jr J:

Earlier this evening I dismissed this application for an interlocutory prohibitory injunction restraining United Engineers (M) Berhad, ("UE") the first defendant herein, by itself or through its agents and/or servants from singing the proposed contract pursuant to the letter of intent for the privatisation of the North-Couth Interurban Toll Expressway. I shall now proceed to give my reasons for that decision.

The application was the result of a suit being Civil No. 21-55-1987 wherein the plaintiff is Mr. Lim Kit Siang, a member of Parliament and leader of the opposition and the defendants are UE (the first defendant), the Finance Minister (the second defendant), the Minister of Works (the third defendant) and the Government of Malaysia (the fourth defendant).

The plaintiff, by his statement of claim, seeks the following reliefs:

(1) A declaration that the award of letter of intent for the privatisation of the North-South Highway by the second and third defendants is null and void and of no consequence;

(2) An injunction to restrain the first defendant by itself or through its agents and/or servants or howsoever from singing the contract with any agent and/or servant of the Government of Malaysia;

(3) Costs and

(4) Any further or other relief deemed fir and proper by this honourable Court.

The essential facts according to the affidavit of the plaintiff filed in support of the application may be stated in a few sentences.

On 13 August 1985, the first defendant had submitted a proposal to the Cabinet through the ministry of finance for the privatisation of the North-South Interurban Toll Expressway, the new Klang valley expressway and the upgrading of the federal highway route 11 between Subang Jaya and Klang.

At a meeting held on 29 January 1986, the Cabinet decided that the Ministry of Works invite open tenders from concessionaries and entrepreneurs for the privatisation of the North-South Highway according to various "package" deals and proceed with the project according to procedure after consultations with the ministry of finance.

By the closing date for tenders the Ministry of Works received tenders from five contractors, in all incorporated companies, of whom one was UE, the first defendant.

In December 1986 UE emerged the successful tenderer for the RM3.4 billion contract and was awarded a letter of intent by the Ministry of Works.

The plaintiff alleges that UE is an insolvent company which had reported losses of over RM100 million and is still suspended from the Kuala Lumpur stock exchange. The plaintiff further alleges that an incorporated Company, known as Hatibudi Sdn. Bhd., the investment arm of UMNO control about 50% of UE. The plaintiff also alleges that the Prime Minister, the Deputy Prime Minister, the Finance Minister (the Second defendant) and the Minister for Agriculture (who were also trustees of Hatibudi) by taking part in the Cabinet decision of 29 January 1986 on the invitation of tenders for the North-South Highway project had used their public position for UMNO's advantage in contravention of s. 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

The plaintiff also alleges wrongdoing on the part of the Finance Minister (the second defendant) and the Minister of Works (the third defendant).

So far as the second defendant is concerned, the plaintiff alleges that it was wrong in law for the second defendant, being a trustee of Hatibudi Sdn. Bhd., (a company with a substantial interest in UE) to have approved the award to UE. So far as the third defendant is concerned, the plaintiff alleges that the third defendant was biased in favour of UE in that he and the MIC (of which he is president) had benefited by the sale of about RM1 million worth of Maju Institute of Education Development (MIED) lottery tickets to UE.

Furthermore, the plaintiff alleges that the tender exercise for the privatisation contract and the evaluation exercise were not carried out fairly in that the terms offered by two of the other four contractors who competed for the contract were more favourable than those offered by UE.

In conclusion, the plaintiff alleges that were the signing of the contract to proceed the government would be embarking upon an illegal transaction his interest as a citizen, motorist and taxpayer and the interest of the public generally would suffer.

I must now turn to the application before me.

As the third defendant was reported in the Star newspaper dated 15 August 1987 to have publicly announced that the contract would be signed some time this week, the plaintiff stressed the urgency of the application and his solicitors put in a certificate of urgency dated today. I therefore decided to hear it today itself. But in view of the importance of the issues raised, I thought it desirable that although the application was an *ex parte* one, the state legal adviser be notified of the hearing so that I could have the advantage of listening to any arguments he may wish to advance on behalf of the second, the third and the fourth

defendants. In the circumstances, the application was, in effect, an opposed *ex parte* application: see *Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd.* [1972] 1 WLR 1213.

At the conclusion of the arguments, I dismissed the application mentioning two main grounds for doing so. However, I did add that there may be further and other grounds for my decision.

In the first place, I was amply satisfied that although the injunction sought was in form against UE, the third defendant, it would, if granted operate in substance and effect as an injunction against the Government of Malaysia, the fourth defendant. The maxim of equity is that equity looks to the substance and the intent, rather than to the form and so it was to the substance of the injunction sought that I should look. That being the case, s. 29 of the Government Proceedings Ordinance 1956, posed, in my opinion, an insuperable obstacle in the way of the plaintiff for it provides:

> 29. (1) In any civil proceedings by or against the government the Court shall, subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
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> Provided that -
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> (a) where in any proceedings against the government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
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> (b) in any proceedings against the government for the recovery of land or other property the Court shall not make an order for the recovery of the land or the delivery of the property but may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property or to the possession thereof.
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> (2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.

In the second place, in *American Cyanamid v. Ethicon* [1975] 1 All ER 396 Lord Diplock ended his enunciation of principle by saying: "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases". Actions against public authorities have been treated as a special case and so in assessing where the balance of convenience lies the public interest may rightly be taken into consideration: *Smith v. Ilea* [1978] 1 All ER 411. Bearing this in mind, I considered that were I to grant the injunction sought its effect would be to impugn the powers of the Government of Malaysia to enter into contracts. It seemed to me, therefore, that it would be plainly against the public interest to grant the injunction.

I might as well add that I did not consider that there was evidence to show that the proposed contract was illegal having regard to the provisions of s. 24 of the Contracts (Malay States) (Revised 1974) Act which reads:

> 24. The consideration or object of an agreement is lawful, unless-
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> (a) it is forbidden by law; or
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> (b) it is of such a nature that, if permitted, it would defeat the provisions of any law; or

(c) it is fraudulent; or

(d) it involves or implies injury to the person or property of another: or

(e) the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

There was also the further consideration that the writ and the application were filed with hardly any time left before the signing of the contract although this could have been done at a much earlier stage since the plaintiff had himself said that it was on 4 January 1987 that the minister of works (the third defendant) had publicly announced that UE had won the contract and that construction would start in April 1987. The effect of the grant of the injunction at this late stage when preparations must have reached a very advanced stage must surely be to cause maximum disruption.

Finally, the sufficiency of the personal undertaking as to damages offered by the plaintiff was open to serious doubt because, although the proposed contract had not yet been signed some preparations must have been made since its execution was imminent. It is trite law that if the plaintiff is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction must be refused: *Morning Star Co-operative Ltd. v. Express Newspapers Ltd.* [1979] FSR 113. However, having regard to the absence of any evidence as to the expenditure incurred in such preparations, I did not think it right or fair to place any reliance on this particular ground and I accordingly disregarded it.

In all the circumstances, the application was dismissed. However, I made no order as to costs as the application was made *ex parte*.

Also found at [1987] 2 CLJ 233